

second agreement, the defendants filed a counterclaim against the plaintiff for the return of the said sum. No defence to the counterclaim was filed by the plaintiff. Order 10, rule 6 of the Subordinate Courts Rules, 1950 provides:

"Where any defendant counterclaims, the plaintiff shall, if he desires to defend such counterclaim, file and cause to be served on the counterclaimant a defence to counterclaim within such time as the court shall direct."

In spite thereof the learned president dismissed the counterclaim with costs. It is true that the plaintiff had in paragraph 6 of his statement of claim stated:

"6. The plaintiff on the 30th day of September, 1970 forfeited the sum of \$5,000 paid as deposit under the said agreement for the aforesaid breach."

That fact, however, was not at all material to the claim of the plaintiff for possession of the premises or for award of damages. By dismissing the counterclaim the learned president not only allowed the plaintiff to retain the sum of \$5,000 as an amount forfeited to him but, in addition, gave judgment for the plaintiff awarding him damages at the rate of \$500 per month as from the 1st day of October, 1970 until delivery of possession. No part of the plaintiff's claim sought a declaration that he was entitled to forfeit the sum of \$5,000 as a genuine pre-estimate by the parties of damages for any breach of contract. I have already held that the tenancy rights of the defendants continued even under the second agreement and consequently the contractual rent of the premises was \$500 per month. The defendants enjoyed a certain status of irremovability under the Control of Rent Act, 1966. An equivalent of 3 months rent alone could at the maximum be received in advance by the plaintiff under section 4(1) of the Control of Rent Ordinance, 1956. The deposit of \$5,000 received by the plaintiff was totally unauthorised and was recoverable by the defendants. In fact the agreement relating to the deposit of \$5,000 was illegal under section 4(3) of the Control of Rent Ordinance, 1956. The provisions of section 4 of the Control of Rent Ordinance, 1956 are practically reproduced in section 10 of the Control of Rent Act, 1966. Apart from the question that this sum was received in contravention of the provisions of the Control of Rent Ordinance, 1956 and even if it was considered that the learned president was right in deciding that the second agreement created not a lease but a licence in favour of the defendants, he should have considered the provisions of section 75 of the Contracts Ordinance, 1950. This he failed to do. The clauses relating to the forfeiture of \$5,000 were obviously in the nature of a penalty. The question however is otiose as I have already held that the plaintiff had no right whatsoever to ask for or receive any deposit unless such deposit was to be treated as advance payment of 3 months rent and did not exceed it.

The appeal is allowed. The order of the learned president is set aside. The plaintiff's claim is dismissed with costs and on the defendant's counterclaim, there will be judgment against the plaintiff for the sum of \$5,000 and costs. Both the defendants had filed a notice of appeal but it was only the first defendant who proceeded on with this appeal. The appellant will

A have the costs of this appeal but both the defendants will have the costs of the action as well as their counterclaim before the learned president.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Arulanandom & Co.*

B

YAP YEW YEE v. SUBRAMANIAM & ANOR.

[O.C.J. (Mohamed Azmi J.) February 26, 1972]

[Kuala Lumpur — Civil Suit No. 1794 of 1968]

C *Negligence — Road accident — Road junction — Taxi proceeding along major trunk road — Motorcycle crossing from minor estate road — Collision — Taxi driver not to blame for accident.*

This was an action for damages against the owner of a motor taxi and the second defendant its driver for damages resulting from a collision between the motorcycle driven by the plaintiff and the motor taxi. At the time of the accident the motor taxi was proceeding along a major trunk road. The plaintiff's motorcycle suddenly emerged from a minor estate road on the left hand side from a distance of about 30' away and the accident took place.

D *Held: (1) the taxi driver, on the main trunk road was entitled in the absence of any traffic sign to warn him of any danger ahead or of any indication by the motor cyclist coming from a minor side road to assume that the motor cyclist would stop at the junction and give him the right of way. In the circumstances there was nothing he could do to avoid the accident;*

E *(2) both on the facts and the law, the plaintiff was wholly to blame. The folly of the plaintiff in entering onto the main road without stopping at the junction, cannot be regarded as reasonably foreseeable.*

Cases referred to:-

- F (1) *Lang v. London Transport Executive & Anor.* [1959] 3 All E.R. 609.
- (2) *K.R. Taxi Service Ltd. & Anor. v. Zaharah & Ors.* [1969] 1 M.L.J. 49 at p. 53.
- (3) *Wan Siew Lum v. Mohd. Ariffin* [1965] 1 M.L.J. xii.

CIVIL SUIT.

T. K. Tang for the plaintiff.

G. Vadiveloo for the defendants.

G

Cur. Adv. Vult.

H *Mohamed Azmi J.:* On August 30, 1964, a collision occurred between a motorcycle ridden by the plaintiff and a motor taxi driven by the second defendant, along the Kuala Lumpur/Ipoh main trunk road. The plaintiff now claims against the owner and the driver of the motor taxi for damages for personal injuries and loss sustained by him as a result of the accident.

The case for the plaintiff as contained in paragraphs 3 and 4 of the statement of claim is that:

"On or about the 30th of August 1964, at about 2.10 p.m. the plaintiff was travelling along Jalan Sungei Gapi Estate and stopped at the junction between Jalan Sungei Gapi Estate and the Main Road from Kuala Lumpur to Kuala Kubu Bharu. While the plaintiff was waiting at the junction as aforesaid, the second defendant so negligently drove the said motor taxi along the Main Road... that it collided with the plaintiff's said motorcycle..."

The plaintiff testified in evidence in chief that on that day he was riding his motorcycle from Sungei

Gapi Estate along the Estate road. It was drizzling. When he reached the main road, he stopped at the junction at a point marked 'H' in the sketch plan (Exhibit AB3). Then a motor taxi coming from the direction of Kuala Lumpur knocked into him whilst he was stationary. It was speeding. After he was knocked down, he fainted and it was only at Kuala Lumpur General Hospital that he became semi-conscious. Under cross-examination, the plaintiff at first denied completely that he was knocked down when he rode onto the main road. But, subsequently, he was forced to concede that he did move a little bit out, and it was at that juncture that he was knocked down.

By their statement of defence, save for the collision between the two vehicles at or near the said junction, the defendants deny paragraphs 3 and 4 of the statement of claim. The second defendant testified that on that day he was driving the motor taxi with four passengers, one of whom was the first defendant. It was raining from Kuala Lumpur and he was travelling at 30 to 35 miles per hour. While the taxi was so travelling on its correct side of the road, the plaintiff's motorcycle suddenly emerged from Sungei Gapi Estate Road to the main trunk road in front of the taxi and thereby caused the collision.

On the evidence before me, it is my finding of fact that at the time of the collision both vehicles were in motion. I cannot accept the plaintiff's story that his motorcycle was stationary when the impact took place. Although the plaintiff did not say so in so many words, it is abundantly clear even from his own testimony, that the motor taxi did not knock into him whilst his motorcycle was stationary.

In this case, in so far as how the accident occurred, I find the plaintiff is not a reliable witness. In evidence in chief, he testified that his motorcycle was stationary when the motor taxi knocked into him. Under cross-examination, he conceded that he was not in fact stationary, and when questioned by the court, he again modified his story by alleging that he had turned left for about half a foot towards the direction of Ipoh when he was knocked down. If he had turned left into the main trunk road as alleged then it is only reasonable to infer that his motorcycle would have been knocked from the rear. But the damage to the motorcycle does not support this particular version of the plaintiff's story. The two photographs of the motorcycle in the agreed bundle of documents clearly show that only the front part of the vehicle was damaged. Indeed, under cross-examination, the plaintiff agreed that the point of impact was on the off-side front wheel of the motorcycle. The taxi hit his right leg and he fell to his left. This is supported by the evidence of Dr. T. H. Khoo Lim (P.W. 2) who testified that the fracture of plaintiff's right thigh bone (fracture shaft right femur) was consistent with impact coming from the right side. In the light of all the evidence and in particular the plaintiff's admission that his motorcycle was not stationary at the time of impact, I have come to the conclusion that the plaintiff did not in fact stop at the junction, but rode slowly on to the main trunk road with the intention of turning to the right towards the direction of Kuala Lumpur in the face of oncoming traffic. At all material times, the plaintiff was a "Kepala" in

A the Sungei Gapi Estate and was staying at Rawang. On that day at about 2.15 p.m. he was returning from work and therefore it is more probable that he was turning right to Rawang rather than turning left to Ulu Yam. Further, there was a slight gradient at the point where Sungei Gapi Estate Road meets the main trunk road, and as the plaintiff was not an experienced rider — having obtained a provisional driving licence only about eight and a half months prior to the accident — it is highly probable that he did not stop at the junction at all before going on to the main road, and as such he failed to ensure that the road was clear before cutting across. If he had stopped at the junction as alleged, it is inconceivable that he never saw the motor taxi until after the impact. Even if it is true that from the head of the junction at Sungei Gapi Estate Road, his view was obstructed by a big tree towards the direction of Kuala Lumpur, and that visibility was limited to about twenty-seven feet, in my view, the fact that the plaintiff knew of this obstruction, is the more reason why he should take extra precaution before entering the main road. By failing to stop at the junction, the plaintiff was the author of his own misfortune.

In this case, I find the plaintiff has failed to prove any negligence on the part of the taxi driver. First, it is alleged that he drove too fast on a rainy day. The fact that the motor taxi had its small lights on did not, however, justify the inference that the rain was so heavy that it caused difficulty in vision. There is no evidence to this effect and even the plaintiff appears to have attributed the limitation of vision to the big tree rather than the rain. To my mind, driving at 2.15 p.m. on a highway at 30 to 35 miles per hour on an ordinary rainy day does not amount to speeding especially where there is no traffic on the road and no speed limit or other traffic signs to warn motorists of any possible danger ahead. The allegation of speeding is supposed to be corroborated by Abdul Rahman bin Mohamed (P.W. 3) who lived directly opposite the junction. Abdul Rahman did not see how the accident took place, but he testified that a short while before the accident he saw the motor taxi coming at a speed from the direction of Kuala Lumpur towards Tanjong Malim. It is interesting to note how Abdul Rahman came to be discovered. According to the plaintiff, after knowing the date of trial, he went to see a friend to find out whether there was any eye-witness to the accident, and it was about ten days before this trial that he met this important witness. Having regard to the fact that this accident took place in August 1964 and the present action was filed four years later in October 1968, it is most improbable, to say the least, that this material witness was only discovered in 1971. In as much as Abdul Rahman did not see the accident at all, it is more probable having regard to the circumstances which led to his discovery, that he did not see anything till the accident was all over. On the question of speed, I accept the evidence of both the defendants that the motor taxi was travelling at 30 to 35 miles per hour, and under the circumstances of this case, the taxi-driver could not be said to be speeding.

In this case, the point of impact must be at or close to the junction near the centre white line. Ac-

According to the table at page 87 of *Bingham's Motor Claims Cases*, 6th Edition, travelling in perfect conditions at 40 miles per hour, it would take a driver an overall distance of 120 feet to stop, and at 30 miles per hour, it would take 75 feet. In the instant case, the taxi driver first saw the plaintiff at a point of 30 feet away, and according to the sketch plan, the taxi finally came to a stop about 58 feet from the junction. In other words, he managed to stop his vehicle within an overall distance of about 88 feet on a wet road. This, to my mind, is consistent with the defence story that the taxi-driver was travelling at 30 to 35 miles per hour and applied his brakes before the collision. Further, if he had been speeding, the injuries to the plaintiff would have been fatal.

As regards the plaintiff's allegation that the taxi-driver drove on the wrong side of the road, I find that this is a wild allegation without any foundation whatsoever. Similarly, the allegation that he passed too close to the plaintiff's stationary motorcycle at the junction has been disproved by the plaintiff's own evidence. From the damage caused to both vehicles and the medical evidence, it is my finding that the centre front part more to the left side of the motor taxi had come in contact with the off-side front half of the motor cycle. The road at the scene was twenty-three feet wide, and the motor taxi was travelling on its correct side of the road — the off-side wheels being about two feet from the centre white line. Having regard to the width of the motor taxi, this would mean that the second defendant was driving about four to four and a half feet from the left edge of the road. I therefore accept the story of the defence that the plaintiff fell in front of the taxi, and the second defendant swerved to the left to avoid running over the plaintiff, resulting in the motor taxi going to the grass verge on the left side of the road and being swung round towards the direction of Kuala Lumpur.

The suggestion by the plaintiff that he fell at point 'H' in the sketch plan cannot, in my view, be supported by the evidence, although that was the point where the blood mark was found. There is evidence that the plaintiff fell near the centre of the road and was later carried by the first defendant and others to the side of the road. Indeed, counsel for the plaintiff in his written submission has submitted that the collision occurred on or near the centre line. It is therefore more probable that the plaintiff fell near the centre white line and was then carried to point 'H' in the sketch plan where the blood mark was subsequently found by the police. As a result of the impact, his motorcycle was, however, thrown to the left grass verge about thirty feet away.

As regards the alleged failure of the second defendant to give any sufficient warning of his approach, and failure to apply his brakes sufficiently or in time to manoeuvre the motor taxi so as to avoid hitting the plaintiff's motorcycle, I am satisfied from the evidence adduced by the defence that when the taxi-driver first saw the motorcycle, it was about to come out of the side road into the main road about thirty feet away. He sounded his horn and applied his brakes. But as both vehicles were in motion, he could not avoid the collision. The unexpected emergence of the plaintiff

from the side road, and the application of brakes by the taxi-driver are consistent with the police report in the agreed bundle of documents. Under such circumstances, and travelling at about 30 to 35 miles per hour, I do not think even a perfect driver could have avoided the accident. As shown at page 87 of *Bingham's Motor Claims Cases*, at 30 miles per hour a driver would take 75 feet to stop, i.e. 30 feet thinking distance plus 45 feet stopping distance. At 40 miles per hour, it would take an overall stopping distance of 120 feet. In the instant case, the taxi-driver only had about thirty feet within which to avoid the accident. Therefore, even before he could have thought what to do, the collision would have occurred.

Finally, regarding the alleged failure of the taxi-driver to keep any proper look-out, it is essential to observe that, in this case, at the time of the accident it was raining and the motor taxi was doing 30 to 35 miles per hour. The taxi-driver was proceeding along a main trunk road and therefore had the right of way. There was no other traffic on the road. Then, all of a sudden, he saw the plaintiff's motorcycle emerging from a minor estate road on the left hand side from a distance of about thirty feet. This is not a case where the accident occurred at a cross-road in a built-up area as in the case of *Lang v. London Transport Executive & Anor.*⁽¹⁾ In the present case, the accident occurred on an open country road. I think the taxi-driver on the main road was entitled, in the absence of any traffic sign to warn him of any danger ahead or of any indication by the motorcyclist coming from a minor side road, to assume that the motorcyclist would stop at the junction and give him the right of way. There was nothing the taxi-driver could have done to avoid the accident, short of stopping immediately and allowing the plaintiff to pass in front of him, which under the circumstances of the present case was quite impossible. I think the folly of the plaintiff in entering into the main road without stopping at the junction cannot be regarded as reasonably foreseeable. Thus, in the Federal Court case of *K.R. Taxi Service Ltd. & Anor. v. Zaharah & Ors.*,⁽²⁾ Ong F.J. (as he then was) observed:

"With respect, it seems to me that unless we hold that the development of the common law of negligence has now reached the stage of imposing strict liability on a person not to injure his neighbour, however blamelessly, we cannot demand that all drivers of vehicles should be perfectionists...."

The degree of care that need be kept while driving along an open country road is not quite the same as that which ought to be observed in a crowded city street. Merely because drivers of motor cars and motor-cycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down."

Both on the facts and the law, I have no alternative but to find that the plaintiff is wholly to blame in this unfortunate accident.

Had the taxi-driver been guilty of negligence or contributory negligence, I would have assessed the

damages in the following way. The plaintiff was about thirty-six years old at the time of accident, and was employed as a 'Kepala' in the Sungei Gapi Estate for six months prior to the unfortunate incident at a salary of \$190 per month. He was hospitalized for about four months from August 30, 1964 to December 24, 1964 and then continued to receive treatment as an out-patient at the General Hospital, Kuala Lumpur. He could not do any work from August 30, 1964 to March 3, 1965, i.e. the period of total temporary disablement was about six months. As regards special damage, I would allow \$1,140 for actual loss of earnings. The claim of \$35 for dental treatment was admitted. But the claim of \$600 for hospital expenses should not be allowed in view of the plaintiff's admission that he got free treatment at the hospital. In the absence of satisfactory proof, both the claim for loss of a wrist watch and the alleged payment of \$400 for five tubes of blood must be rejected. I would, therefore, assess special damage at \$1,175 based on 100% liability.

As regards general damages, the plaintiff sustained the following injuries:—

- (i) 2" laceration left parietal region.
- (ii) Bleeding from left ear.
- (iii) Haematoma right orbit.
- (iv) One upper incisor missing.
- (v) Abrasion left face.
- (vi) Abrasion left back from shoulder region to chest wall.
- (vii) 1" superficial laceration above pelvis
- (viii) Right femur: fracture shaft.
- (ix) Left wrist: comminuted fracture lower end of ulna and chip fracture ulna styloid.

The main injuries are the fracture of the shaft of the right femur, and the comminuted fracture of the lower end of the ulna and a chip fracture of the lower end of the styloid. According to the evidence of Dr. T. H. Khoo Lim (PW2), when he examined the plaintiff on June 23, 1965, he found the plaintiff was slightly limping. The plaintiff was unable to bend his right knee and, therefore, was unable to squat fully. But now he is normal both as regards limping and squatting. The only residual disability is in respect of the slight protruding of the lower end of the ulna bone, for which his left hand can now carry less weight than before the accident. Having regard to the medical evidence and the nature of the plaintiff's work, damages for loss of future earnings and the disadvantages arising from disablement including loss of amenities are quite nominal. A substantial sum must, however, be given for pain and suffering. Having considered the cases cited by both counsel, particularly the case of *Wan Siew Lum v. Mohd. Ariffin*,⁽³⁾ on the basis of 100% liability, I would assess general damage for all the injuries sustained at \$6,500.

Claim dismissed.

Solicitors: *M. M. Cumarasami & Co.; Xavier & Vadiveloo.*

A SINGER SEWING MACHINE CO. v. JEREMIAH

[O.C.J. (Wan Suleiman J.) April 3, 1972]

[Seremban — Civil Application No. 2 of 1972]

Practice and Procedure — Appeal — Extension of time to file memorandum of appeal — Grounds — Discretion of court — R.S.C. 1957, O. 64 r. 7.

B This was an application by way of notice of motion by the defendants in magistrate's court, Kuala Pilah, Civil Action No. 65 of 1969, for extension of time to file their memorandum of appeal and for an order of stay of execution of the judgment entered against them in favour of the plaintiff in that action.

C **Held:** as both the conduct of the applicant company and their solicitors was wholly reprehensible, and as there was no material in this application, the court would not exercise its discretion in favour of the applicants.

Cases referred to:—

(1) *Lau Cher Hian v. Collector of Land Revenue, Muar* [1971] 1 M.L.J. 96.

(2) *Ratnam v. Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

MOTION.

D *K. L. Rekhraj* for the applicants/appellants.
Leong Tuck Onn for the respondent.

Wan Suleiman J.: This is an application by way of notice of motion by the defendants in magistrate's court, Kuala Pilah Civil Action No. 65 of 1969, for extension of time to file their memorandum of appeal and for an order of stay of execution of the judgment entered against them in favour of the plaintiff in that action.

E The affidavit of Lee Meng Choo, the authorised agent of appellant company shows that the solicitors for the appellant company had on 11th January, 1971 filed a notice of appeal against the decision of the learned magistrate in this action which was pronounced on 9th January, 1971.

F On 17th February, 1972 the notice informing the appellant company that the appeal record was ready, addressed to the solicitors for the appellants was instead delivered by the process server at the appellant company's premises at No. 19, Jalan 52/1, Petaling Jaya.

G It was also alleged that since the notice had been served —

"on an unauthorised person who had no knowledge what the document was and had left it aside under the mistaken belief that it was a copy of the notice addressed to the solicitors . . . that it warranted no action on his part".

H It was then alleged that on the 25th February, 1972 the solicitors spoke by telephone to the magistrate's court, Kuala Pilah, and was informed that the appellant company had indeed been served with the notice. The solicitors for the appellant company on the same day applied in writing to the magistrate, Kuala Pilah, for extension of time and he very rightly intimated to them that the power to grant extension of time did not lie in his court. The application before me was not made until 11th March, 1972.

I Mr. Rekhraj for the appellant company referred me to a Federal Court decision — *Lau Cher Hian v. Collector of Land Revenue, Muar*⁽¹⁾ — a decision which I would with respect say does not apply to the facts of the present application.